

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
CLIFFORD DREW	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1983	:	
through November 30, 1989.	:	DETERMINATION
	:	DTA NOS. 810695
	:	AND 810696

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In the Matter of the Petition	:	
of	:	
EDELGARD DREW	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1983	:	
through November 30, 1989.	:	

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Petitioner Clifford Drew, 6436 Westwood Drive, Lockport, New York 14094, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983<sup>1</sup> through November 30, 1989.

Petitioner Edelgard Drew, RR #2, Box 1220-13, Afton, New York 13730, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983<sup>1</sup> through November 30, 1989.

A consolidated hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 19,

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<sup>1</sup>The caption on each of the petitions noted a beginning date of May 31, 1983. However, a review of the petitions discloses that the first sales tax quarter referenced is the one ending May 31, 1983, which means it is the quarter beginning March 1, 1983.

1993 at 9:15 A.M., with all briefs to be submitted by November 3, 1993. No briefs were filed by either party. Petitioners each appeared by Dennis D. Curtin, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

### ISSUES

I. Whether petitioner Clifford Drew, as an employee, is a person required to collect tax under Tax Law § 1131(1) so that he is personally liable for sales tax determined due from Hunters Horn Inn for the period March 1, 1983 through November 30, 1989 and, if so, whether penalty and that portion of interest exceeding the minimum interest should be cancelled.

II. Whether petitioner Edelgard Drew, as a partner, is a person required to collect tax under Tax Law § 1131(1) so that she is personally liable for sales tax determined due from Hunters Horn Inn for the period March 1, 1983 through November 30, 1989 and, if so, whether penalty and that portion of interest exceeding the minimum interest should be cancelled.

### FINDINGS OF FACT

The Division of Taxation ("Division") introduced into evidence as its Exhibit "A" documents described by its representative as follows:

"[T]he petition of Clifford Drew together with the conciliation order, the power of attorney to Mr. Curtin, and the various notices of determination attached, which refer to the periods, actually, beginning March 1, '83 through November 30th, '89."

Upon review, included with the petition were the following 18 notices of determination issued against Clifford Drew, each dated February 1, 1991:

<u>Notice Number</u>	<u>Sales Tax Period Ending</u>	<u>Tax Asserted Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Asserted Due</u>
S910201779E (186) <sup>2</sup>	August 31, 1985	\$ 3,748.50	\$ 1,124.45	\$ 3,388.48	\$ 8,261.43

The first digit of the three numbers in parentheses refers to the particular sales tax quarter and the last two digits reference the particular year. For example "(186)" references the first sales tax quarter of 1986. Despite the fact that such quarter ends on August 31, 198~~5~~, it is still the first sales tax quarter of 1986 since sales tax years run from June 1st to May 31st. The notices were not introduced in sequential order and the number coding proved helpful in reorganizing the notices in sequential order.

S910201780E (286)	November 30, 1985	3,315.97	994.59	2,811.45	7,122.01
S910201781E (386)	February 28, 1986	5,621.91	1,686.39	4,463.71	11,772.01
S910201782E (486)	May 31, 1986	3,626.98	1,087.89	2,685.95	7,400.82
S910201783E (187)	August 31, 1986	4,715.13	1,414.51	3,247.29	9,376.93
S910201784E (287)	November 30, 1986 <sup>3</sup>	4,171.03	1,251.30	2,665.01	8,087.34
S910201785E (387)	February 28, 1987 <sup>4</sup>	6,276.97	1,882.89	3,710.68	11,870.54
S910201786E (487)	May 31, 1987	4,049.64	1,214.76	2,202.03	7,466.43
S910201787E (188)	August 31, 1987	5,264.56	1,579.25	2,620.55	9,464.36
S910201788E (288)	November 30, 1987	4,657.17	1,397.11	2,112.66	8,166.94
S910201789E (388)	February 28, 1988	7,051.45	2,115.34	2,899.99	12,066.78
S910201790E (488)	May 31, 1988	4,549.37	1,364.73	1,679.73	7,593.83
S910201791E (189)	August 31, 1988	5,914.16	1,774.21	1,942.42	9,630.79
S910201792E (289)	November 30, 1988	5,231.75	1,569.37	1,513.48	8,314.60
S910201793E (389)	February 28, 1989	6,944.42	2,083.25	1,747.94	10,775.61
S910201794E (489)	May 31, 1989	7,234.92	2,098.00	1,551.30	10,884.22
S910201795E (190)	August 31, 1989	6,656.65	1,730.65	1,186.50	9,573.80
S910201796E (290)	November 30, 1989	<u>0.00</u>	<u>705.68</u>	<u>98.21</u>	<u>803.89</u>
Totals		\$89,030.58	\$27,074.37	\$42,527.38	\$158,632.33

These notices were issued from the Division's Buffalo office and provided the same explanation:

"You are liable individually and as officer of Hunters Horn Inn under sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with section 1138(a) of the Law."

The following eight additional notices of determination, each dated February 1, 1991 and included in Exhibit "A", were issued against petitioner Edelgard Drew, not Clifford Drew:

Notice Number	Sales Tax Period <u>Ending</u>	Tax Asserted Due	<u>Penalty</u>	<u>Interest</u>	Total Asserted Due
S910201743E (483)	May 31, 1983	\$2,846.06	\$ 711.50	\$4,251.82	\$ 7,809.38
S910201744E (184)	August 31, 1983	3,409.14	852.25	4,841.99	9,103.38
S910201745E (284)	November 30, 1983	3,127.46	781.77	4,218.85	8,128.08
S910201746E (384)	February 28, 1984	3,943.94	985.79	5,050.22	9,979.95

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This notice contained a typographical error and referenced the quarter ending November 30, 1987.

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This notice contained a typographical error and referenced the quarter ending February 28, 1978.

S910201747E (484)	May 31, 1984	2,544.50	636.02	3,085.38	6,265.90
S910201748E (185)	August 31, 1984	3,307.85	826.79	3,792.98	7,927.62
S910201749E (285)	November 30, 1984	2,926.28	731.51	3,170.33	6,828.12
S910201750E (385)	February 28, 1985	4,469.36	1,117.26	4,570.66	10,157.28

No notice was included in Exhibit "A" for the sales tax quarter ending May 31, 1985

(485). The Conciliation Order dated January 17, 1992 issued against Clifford Drew, which was included in Exhibit "A", referenced notice numbers S910201770E through and including

S910201796E. However, nine notices issued against Clifford Drew with numbers

S910201770E through and including S910201778E were not made part of Exhibit "A".

Furthermore, it is noted that Exhibit "A", as introduced at the hearing, did not have all of the notices in sequential order. Upon careful review of the exhibit, all of the notices were organized in sequential order, and it became clear that the above-described notices referenced in the Conciliation Order were not included in the exhibit.

The Division introduced into evidence as its Exhibit "C" the petition of Edelgard Drew, which included the following 27 notices of determination issued against Mrs. Drew, each dated February 1, 1991:

<u>Notice Number</u>	<u>Sales Tax Period Ending</u>	<u>Tax Asserted Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Asserted Due</u>
S910201743E (483)	May 31, 1983	\$ 2,846.06	\$ 711.50	\$ 4,251.82	\$ 7,809.38
S910201744E (184)	August 31, 1983	3,409.14	852.25	4,841.99	9,103.38
S910201745E (284)	November 30, 1983	3,127.46	781.77	4,218.85	8,128.08
S910201746E (384)	February 28, 1984	3,943.94	985.79	5,050.22	9,979.95
S910201747E (484)	May 31, 1984	2,544.50	636.02	3,085.38	6,265.90
S910201748E (185)	August 31, 1984	3,307.85	826.79	3,792.98	7,927.62
S910201749E (285)	November 30, 1984	2,926.28	731.51	3,170.33	6,828.12
S910201750E (385)	February 28, 1985	4,469.36	1,117.26	4,570.66	10,157.28
S910201751E (485)	May 31, 1985 <sup>5</sup>	2,883.51	720.77	2,775.14	6,379.42
S910201752E (186)	August 31, 1985	3,748.50	1,124.45	3,388.48	8,261.43
S910201753E (286)	November 30, 1985	3,315.97	994.59	2,811.45	7,122.01
S910201754E (386)	February 28, 1986	5,621.91	1,686.39	4,463.71	11,772.01
S910201755E (486)	May 31, 1986	3,626.98	1,087.89	2,685.95	7,400.82

This notice contained a typographical error and referenced the quarter ending May 31, 1988.

S910201756E (187)	August 31, 1986 <sup>6</sup>	4,715.13	1,414.51	3,247.29	9,376.93
S910201757E (287)	November 30, 1986 <sup>7</sup>	4,171.03	1,251.30	2,665.01	8,087.34
S910201758E (387)	February 28, 1987	6,276.97	1,882.89	3,710.68	11,870.54
S910201759E (487)	May 31, 1987	4,049.64	1,214.76	2,202.03	7,466.43
S910201760E (188)	August 31, 1987	5,264.56	1,579.25	2,620.55	9,464.36
S910201761E (288)	November 30, 1987	4,657.17	1,397.11	2,112.66	8,166.94
S910201762E (388)	February 28, 1988	7,051.45	2,115.34	2,899.99	12,066.78
S910201763E (488)	May 31, 1988	4,549.37	1,364.73	1,679.73	7,593.83
S910201764E (189)	August 31, 1988	5,914.16	1,774.21	1,942.42	9,630.79
S910201765E (289)	November 30, 1988	5,231.75	1,569.37	1,513.48	8,314.60
S910201766E (389)	February 28, 1989	6,944.42	2,083.25	1,747.94	10,775.61
S910201767E (489)	May 31, 1989	7,234.92	2,098.00	1,551.30	10,884.22
S910201768E (190)	August 31, 1989	6,656.65	1,730.65	1,186.50	9,573.80
S910201769E (290)	November 30, 1989	<u>0.00</u>	<u>705.68</u>	<u>98.21</u>	<u>803.89</u>
Totals		\$118,488.68	\$34,438.03	\$78,284.75	\$231,211.46

These notices were also issued from the Division's Buffalo office and provided the same explanation as noted above for the notices issued against Clifford Drew.

The Division is seeking payment of sales tax on the sales of Hunters Horn Inn, a Lockport (Niagara County) restaurant, over approximately a 6½-year period when no sales taxes were remitted. The notices of determination were issued against Clifford Drew and against Edelgard Drew as officers despite the fact that it does not appear that the restaurant was operated by a corporation, of which petitioners were officers.

Tuesday Ann Fuoco, who was employed as a waitress and bartender at Hunters Horn Inn, described the restaurant as follows:

"We had one large dining room, that wasn't very visible from the bar, that seated about 50 people, maximum 55, if you pushed it; and the kitchen came off of that dining room.

"The other side of the restaurant was a bar with a small -- we called it the 'lounge', a small . . . dining room that . . . had five tables . . . . And the bar had about six stools . . . ."

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This notice contained a typographical error and referenced the quarter ending August 31, 1989.

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This notice contained a typographical error and referenced the quarter ending November 30, 1987.

In calculating sales tax asserted as due, the Division accepted taxable sales as reported on 25 forms ST-100 and 2 forms ST-102, sales and use tax returns, late-filed on behalf of Warren and Edelgard Drew d/b/a Hunters Horn Inn. All 27 returns were signed by Edelgard Drew, with 23 signed on October 28, 1989 and received by the Division on November 13, 1989, and 4 signed on January 26, 1990 and received on January 30, 1990. The returns disclosed the following gross sales, taxable sales and tax due:

Period <u>Ending</u>	Gross <u>Sales</u>	Taxable <u>Sales</u>	Tax <u>Due</u>
(483) May 31, 1983	\$ 50,711.00	\$ 40,658.00	\$ 2,846.06
(184) August 31, 1983	60,765.00	48,702.00	3,409.14
(284) November 30, 1983	56,071.00	44,678.00	3,127.46
(384) February 29, 1984	70,428.00	56,342.00	3,943.94
(484) May 31, 1984	45,438.00	36,350.00	2,544.50
(185) August 31, 1984	59,069.00	47,255.00	3,307.85
(285) November 30, 1984	52,254.00	41,804.00	2,926.28
(385) February 28, 1985	79,810.00	63,848.00	4,469.36
(485) May 31, 1985	51,491.00	41,193.00	2,883.51
(186) August 31, 1985	66,937.00	53,550.00	3,748.50
(286) November 30, 1985	59,214.00	47,371.00	3,315.97
(386) February 28, 1986	100,391.00	80,313.00	5,621.91
(486) May 31, 1986	64,767.00	51,814.00	3,626.98

(187) August 31, 1986	84,199.00	67,359.00	4,715.13
(287) November 30, 1986	74,483.00	59,586.00	4,171.03
(387) February 28, 1987	112,089.00	89,671.00	6,276.97
(487) May 31, 1987	72,315.00	57,852.00	4,049.64
(188) August 31, 1987	94,010.00	75,208.00	5,264.56
(288) November 30, 1987	83,164.00	66,531.00	4,657.17
(388) February 28, 1988	125,919.00	100,735.00	7,051.45
(488) May 31, 1988	81,239.00	64,991.00	4,549.37
(189) August 31, 1988	105,610.00	84,488.00	5,914.16
(289) November 30, 1988	93,423.00	74,739.00	5,231.75
(389) February 28, 1989	99,206.00	99,206.00 <sup>8</sup>	6,944.42
(489) May 31, 1989	103,356.00	103,356.00	7,234.92
(190) August 31, 1989	95,095.00	95,095.00	6,656.65
(290) November 30, 1989	<u>91,648.00</u>	<u>91,648.00</u>	<u>6,415.36<sup>9</sup></u>
Totals	\$2,133,102.00	\$1,784,343.00	\$124,904.04

Clifford Drew, the son of Warren Drew and Edelgard Drew, testified that "somewhere between January of '89 and my father's passing away [in May of 1989]" he became aware that Federal withholding and social security taxes had not been paid by the restaurant. After his father's death in May of 1989, he learned that sales tax had also not been paid by the business. The late-filed sales tax returns were prepared at the request of a "State tax agent, at which time I went to Mr. Carney and asked for these returns." William Carney was described by Clifford Drew as the accountant of his father, Warren Drew. Mr. Carney prepared the returns which were signed by Clifford Drew's mother, Edelgard Drew.

Edelgard Drew testified that she first became aware that sales tax had not been paid when the returns were submitted to her for signing. Mrs. Drew testified that she never reviewed with her husband, Warren Drew, the filing of returns or the payment of sales tax:

"I tried to [discuss the filing of returns and payment of sales tax], but I was cut off. And he would just never discuss taxes or anything like that. He said that was his department; he took care of that.

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<sup>8</sup>It is unknown why taxable sales were the same as gross sales for the four latest quarters. There is no information in the record concerning what nontaxable sales consisted of in the 23 earlier quarters.

<sup>9</sup>Tax was paid for this quarter.

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"Well, all I know is that anything that pertained to the financing of the business was my husband's job."

Edelgard Drew's testimony that she did not know sales tax had not been paid by the restaurant until the returns were submitted to her for signing in October of 1989 might seem improbable to someone who did not know the details of her life's travail. However, her deeply personal and emotional testimony gives credence to the finding that she was not aware of unpaid sales tax until such time.

Mrs. Drew was a teenager in Germany when, in 1943, her family lost everything:

"We were bombed and we were fleeing from one area to the other during the rage that went over Europe . . . ."

At 19, in Berlin, she met Warren Drew, with whom she came to the United States and subsequently married. Warren Drew also brought Mrs. Drew's sisters and brothers to the United States. Edelgard and Warren Drew raised a family of four children, including petitioner Clifford Drew and Warren John Drew, who was the chef of Hunters Horn Inn.

Mrs. Drew had little formal education, and as a native German speaker only learned English upon arrival in the United States. In 1955, her husband, Warren Drew, went into the restaurant business, and in 1959, Mrs. Drew started working as a hostess in restaurants operated by her husband. During the years at issue, she served as a hostess at Hunters Horn Inn and had no responsibility for financial matters. She had no authority to sign checks and had nothing to do with the preparation or filing of tax returns. Warren Drew controlled all of the restaurant's assets and made all business decisions of any significance.

Mrs. Drew's life at the restaurant, as it was in the home, was controlled by her husband, on whom she was dependent as well as subservient. Mrs. Drew testified:

"If I would have ever questioned anything, I was told that he has everything under control and it's none of my business or more or less not to concern myself with it, that he takes care of the financial part of the business.

"Or he would, if I ever would question him about monies or so on about the business, he would tell me, well, as I said before, that he is in charge of it.

"I had a very poor -- no communication with my husband as far as the



business is concerned. I did what he asked me to.

"And that's how I was brought up in Europe, you know. This is how it is in Europe. You more or less do what your husband tells you to. And I trusted that he, you know, did what is right."

In 1983, Warren Drew and Edelgard Drew purchased the restaurant property for \$125,000.00 from Fieldstone Inn, Inc. The purchase agreement described the buyers as "Warren Drew and Edelgard Drew, his wife." The Division introduced into evidence, as part of its Exhibit "G", a photocopy of an "Addendum to Purchase Agreement" which was signed by Warren Drew and Edelgard Drew. Mrs. Drew did not deny signing this document, but she explained:

"I remember going, being at the lawyer's office and having to sign all sorts of paper, papers. I don't know really what I signed, or what in particular I signed. I just signed on the dotted line where I was told to sign."

In short, Edelgard Drew signed documents as directed by her husband.

The record does not disclose whether Warren Drew and Edelgard Drew ever executed a partnership agreement. On cross-examination, Mrs. Drew testified as follows with regard to her status as a "partner":

Attorney Glass: "Am I correct, Mrs. Drew, that you did testify earlier<sup>10</sup> that you knew you were a partner?"

Edelgard Drew: "I was told I was a partner; yes. My name was on the liquor license."

Attorney Glass: "Right."

Edelgard Drew: "But I really didn't understand the full meaning of being a partner."

Mrs. Drew described her role in the business as follows:

"[I]t was mainly greeting the people and checking on things, that the

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A careful review of Mrs. Drew's testimony establishes that she did not testify earlier that she "knew" she was a partner. She testified (at page 79 of the hearing transcript) that her husband ran his first restaurant as a partnership with his brothers. She also testified (at page 95 of the transcript) that she signed what she was told to sign and did not know whether she signed a document making her a partner with her husband to run Hunters Horn Inn.

customers were satisfied, taking reservations; and that's about what it amounted to. Laying out the dining room for reservations, you know; setting up tables and so on."

Mrs. Drew testified that she "was not on a salary until much later", although exactly when she began to receive a salary and how much was not established. Nonetheless, it appears that for most of the period at issue Mrs. Drew depended on her husband to "give me some money at times if I needed some."

In mid-1984 petitioner Clifford Drew began to work at Hunters Horn Inn. His weekly salary ranged from \$240.00 to approximately \$270.00 during the period at issue. Although he had authority to sign checks on behalf of the restaurant, his father, Warren Drew, directed and controlled what checks he would sign.

The Division introduced into evidence as its Exhibit "J" a photocopy of a Tax Compliance Division log made by Edward Brehm. On this log, Mr. Brehm

noted that, at a conciliation conference on November 21, 1991, Clifford Drew "stated he was the 'general manager', handled all the suppliers, employees and in general ran the business." At the hearing, however, Clifford Drew characterized his duties as basically that of a *matre d'* while his father was alive. On cross-examination, Mr. Brehm conceded that it was possible that Clifford Drew had "been referring to running the business after his father's death when he returned." Clifford Drew had been hospitalized after a car accident in April of 1989, and returned to the restaurant in September of 1989.

Warren Drew had sole control over the restaurant's receipts. Tuesday Ann Fuoco described the restaurant's cash "management" as follows:

"During working hours it [cash] was behind the bar . . . . And when the restaurant closed, either Warren, Sr. or myself would ring the register out, put all the money in a money bag, and then Warren would take it from there."

Petitioners introduced much evidence concerning Warren Drew's alcoholism and excessive consumption of alcoholic beverages as well as his verbal abuse of family and employees. In Tuesday Ann Fuoco's words, everyone "walked on eggshells" around him.

Warren Drew's daughter-in-law, Deborah Drew, described him similarly:

"[H]e was very adamant about, that he didn't have to answer to any of us. And he was his own man and he was in charge of what was going on in his own business."

According to Edelgard Drew, her husband "did things his way, which was his way and only his way. And no one knew what really that was, other than what we could observe." Clifford Drew was protective of his mother, Edelgard Drew, and one reason he continued to work at the restaurant was to provide support and comfort to his mother.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that Hunters Horn Inn operated under the sole and exclusive control of Warren Drew, an extreme alcoholic who shared little or no information with his son, Clifford Drew, and his wife, Edelgard Drew, concerning the finances of the business. Clifford Drew and Edelgard Drew functioned as little more than headwaiters in the business. Edelgard Drew contends that her husband ran the restaurant with an iron hand and never discussed the business with her. Petitioners cite Matter of Hoppl (State Tax Commn., May 27, 1983) in support of their position.

The Division argues that Edelgard Drew is liable for unpaid taxes as a member of a partnership that ran the restaurant. It bases Clifford Drew's liability on statements he made at the conciliation conference and because he signed checks to pay suppliers of the restaurant.

#### CONCLUSIONS OF LAW

A. Tax Law § 1131(1) defines "persons required to collect [sales] tax" as follows:

"[E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article; and any member of a partnership."<sup>11</sup>

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Laws of 1985 (ch 65, § 77, eff September 1, 1985) inserted ", director" and ", any employee of a partnership or any employee of an individual proprietorship", substituted a comma for "or" following "as such officer", inserted ", partnership or individual proprietorship", and inserted a

Tax Law § 1133(a) makes "every person required to collect any tax" personally liable for sales tax required to be collected.

B. The Division asserts that Clifford Drew, as an employee of a partnership that operated the restaurant, is liable for tax due. As noted in footnote "11", as of September 1, 1985, under Tax Law § 1131(1) an employee of a partnership may be found to have a duty to collect sales tax if he "is under a duty to act for such . . . partnership."

C. The determination of whether an individual is a person under a duty to act for a business operation is based upon an examination of the particular facts of the case. In Matter of Moschetto (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in Matter of Constantino (Tax Appeals Tribunal, September 27, 1990):

"[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interests in the corporation" (Matter of Constantino, supra).

In Moschetto (supra), the Tribunal reversed the Administrative Law Judge's determination that an officer of a corporation that operated a car dealership had a duty to act for the corporation in complying with the requirements of the sales tax law. The Administrative Law Judge relied on the following factors: (1) the officer received substantial income from the car dealership; (2) he influenced the hiring of employees and supervised car salesmen; (3) he had check-signing authority and signed checks; (4) he had signed one sales tax check; and (5) was a shareholder, a member of the board of directors and had signed an unlimited guarantee with a bank on behalf of the corporation. The Tribunal decided that the above factors relied on by the Administrative Law Judge were:

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semi-colon following "of this article".

"not sufficient, given the entire circumstances of petitioner's involvement in City Chrysler, to sustain the conclusion that petitioner had a duty to act for the corporation in complying with the requirements of the sales tax law" (Matter of Moschetto, supra).

The Tribunal noted: (1) the officer received the same salary after he became a shareholder as he had when he was only a manager of service and parts and the amount of income received (\$600.00 a week in 1987 through 1989) did not suggest that he was a responsible officer (when sales tax asserted due was approximately \$400,000.00); (2) the officer did not hire and fire without the approval of a Sheldon Reynolds, who had the real authority in the business; (3) his check-signing authority and check-signing activities were circumscribed; and (4) the officer in fact had little actual authority over the corporation's affairs, in spite of his titles and investment. In summary, the Tribunal emphasized its similar decision in Matter of Constantino (supra), where it stated:

"[P]etitioner's role was essentially that of a minority investor and supervising employee who was precluded from taking actions with regard to the financial and management activities of the corporation."

D. Petitioners have related a very sad and intensely personal story of a family restaurant that was run by the iron hand of a father/husband, who acted like a petty tyrant. Edelgard Drew was clearly subservient to her husband in the family business as she was in life. Clifford Drew, like his mother, had little control over the operations of the business.

Applying the factors set forth in Conclusion of Law "C", it is determined that Clifford Drew, as an employee, did not have a duty to act for the restaurant. In particular, his weekly salary of \$240.00 to approximately \$270.00 does not suggest that he had a duty to act for a restaurant with sales tax asserted due of approximately \$100,000.00. Furthermore, Clifford Drew did not hire and fire employees or sign checks to suppliers without the approval of Warren Drew, the real authority in the business. Consequently, Clifford Drew cannot be held liable for the sales taxes of Hunters Horn Inn (cf., Matter of Turiansky, Tax Appeals Tribunal, January 20, 1994 [wherein a very domineering, autocratic boss was determined to have controlled the running of a hotel business]).

As noted in Finding of Fact "1", taxes were asserted as due up through the quarter ending

August 31, 1989. As noted in Finding of Fact "6", Warren Drew died in May of 1989, and as noted in Finding of Fact "11", Clifford Drew returned to the restaurant in September of 1989 after suffering injuries from a car accident in April of 1989. Since Clifford Drew ran the restaurant after his father's death when he returned in September, he is determined to be liable for penalty and interest totalling \$803.89 for the quarter ending November 30, 1989. It is observed that Clifford Drew offered no proof that the failure to file and pay sales tax on a timely basis for such final period was due to reasonable cause and not due to willful neglect (cf., Matter of Disanco Home Center Corp., Tax Appeals Tribunal, February 16, 1989).

E. Petitioners rely on Matter of Hoppl (supra) in support of their contention that Edelgard Drew should not be liable for unpaid sales tax because she had little responsibility in running the restaurant. In Hoppl (supra) a "strong" father allowed the petitioner, his son, very little responsibility in running a restaurant owned by a New York partnership consisting of the father and his two sons. The State Tax Commission decided that the son was not under a duty to collect and pay over withholding taxes because he:

"had no authority to sign checks, did not exercise authority over the payroll or withholding of taxes, had no authority to hire or fire employees . . . , exercised no authority over the assets . . . and owned only a small percentage of the total stock outstanding of [two of three restaurants which were operated in a corporate form, while a third restaurant, of which the petitioner was the manager, was operated by a partnership]."

The Commission's decision noted that the petitioner "was unsure of the extent of his partnership interest" in the restaurant he "managed" and that:

"The Audit Division was unsure as to whether the Notice of Deficiency was intended to cover the unpaid withholding taxes of only one of the three restaurants or of all three."

However, Hoppl (supra) is of minor value in analyzing the matter at hand because it involved personal liability for unpaid withholding taxes under Article 22 of the Tax Law, not personal liability for unpaid sales tax under Articles 28 and 29 of the Tax Law. Moreover, the facts in Hoppl are not clear concerning whether the Division sought to impose liability on the petitioner in Hoppl (supra) for unpaid personal income taxes that should have been withheld and remitted by a partnership.

F. It is clear that, like her son, Edelgard Drew had little control over the operation of the Hunters Horn Inn during the period when her husband ruled the restaurant. However, the matter is more complicated with regard to Mrs. Drew because the Division is now seeking to impose liability because she was a member of a partnership that operated the restaurant. However, as noted in Finding of Fact "9", the record does not establish that Edelgard Drew was her husband's partner in a partnership that operated Hunters Horn Inn. Consequently, the Division's attempt to impose personal liability on Edelgard Drew, regardless of her actual duties and responsibilities, merely because she was a partner in a business that operated a restaurant, must fail (cf., Matter of Hopper, Tax Appeals Tribunal, December 9, 1993 [wherein the Tribunal decided in a withholding tax case that the partnership must first be found liable under the penalty statute before an individual partner may be held liable]).

However, it is determined that Edelgard Drew is personally liable for amounts asserted as due for the sales tax quarters ending August 31, 1989 and November 30, 1989. After her husband's death, as noted in Finding of Fact "5", Mrs. Drew signed sales tax returns on behalf of the restaurant and, in effect, assumed responsibility for taxes that should have been collected and remitted after her husband's death. Furthermore, Edelgard Drew offered no proof that the failure to file and pay sales tax on a timely basis for such two periods was due to reasonable cause and not due to willful neglect (cf., Matter of Disanco Home Center Corp., supra).

G. The petitions of Clifford Drew and Edelgard Drew are granted to the extent indicated in Conclusions of Law "D" and "F", and the notices of determination dated February 1, 1991 are to be cancelled or modified to so conform, but, in all other respects, the petitions are denied.

DATED: Troy, New York  
April 21, 1994

/s/ Frank W. Barrie  
ADMINISTRATIVE LAW JUDGE